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In the Supreme Court of the United States

ABIGAIL NOEL FISHER, PETITIONER

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the University of Texas at Austin's use of race as one of several diversity considerations in a holistic analysis of individual applicants violates the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF THE UNITED STATES

The United States has significant responsibilities for the enforcement of the Equal Protection Clause of the Fourteenth Amendment in the context of institutions of higher learning, see 42 U.S.C. 2000c-6, and for the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin by recipients of federal funds, including institutions of higher education. Numerous federal agencies have concluded that well-qualified graduates from diverse backgrounds are crucial to the fulfillment of their missions. The United States thus has a strong interest in the development of the law regarding the consideration of race and ethnicity in admissions in higher education.

STATEMENT

1. The University of Texas at Austin (the University) is the flagship institution of Texas's public univer-

sity system. Pet. App. 265a. The University is a selective institution, and its admissions policy reflects two decades of evolution and experimentation.

a. Until 1996, the University admitted undergraduates by considering each applicant's Academic Index (AI)—a projection of freshman academic performance—and race. Pet. App. 266a. In 1996, the Fifth Circuit invalidated that policy. *Hopwood* v. *Texas*, 78 F.3d 932, 934-935, cert. denied, 518 U.S. 1033 (1996).

Since 1997, the University has used a Personal Achievement Index (PAI) to supplement the AI. The PAI is a numerical score based on "a holistic review" of applications, including essays, leadership, extracurricular activities, work experience, socioeconomic status, language spoken at home, and other similar characteristics. Pet. App. 278a-280a.

Beginning with the entering class of 1998, the University implemented House Bill 588, also known as the Top Ten Percent law (Top Ten plan). Pet. App. 269a; 1997 Tex. Gen. Laws 304, codified as Tex. Educ. Code Ann. § 51.803 (West Supp. 1997). The Top Ten plan grants public-university admission to Texas high school graduates who are in the top ten percent of their class. Pet. App. 269a. After admitting applicants through the Top Ten plan, the University filled the remainder of its entering class using its AI/PAI analysis. *Id.* at 276a.

b. In 2003, this Court approved the University of Michigan Law School's consideration of race in admissions. *Grutter* v. *Bollinger*, 539 U.S. 306, 343. The University subsequently concluded that considering race in some individual admissions decisions was nec-

essary to achieve the educational benefits of diversity. Pet. App. 270a-272a; S.J.A. 1a, 23a-24a.

In its Proposal to Consider Race and Ethnicity in Admissions, S.J.A. 1a-39a, the University explained that its educational mission includes "produc[ing] graduates who are capable of fulfilling the future leadership needs of Texas" and who are "able to lead a multicultural workforce and to communicate policy to a diverse electorate," S.J.A. 24a. The University concluded that a lack of diversity in the classroom, S.J.A. 24a-26a, rendered it "less able to provide an educational setting that fosters cross-racial understanding." S.J.A. 25a. In addition, "significant differences between the racial and ethnic makeup" of the student body and the State's population meant that students were "being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow." S.J.A. 24a-25a.

c. The University first used its current admissions policy, which permits officers to consider individual applicants' race as one factor among many, in the selection of the 2005 entering class. J.A. 482a-483a. After admitting up to 75% of the entering class through the Top Ten plan, Pet. App. 42a-43a, the University evaluates remaining applicants based on their AI and PAI scores. In calculating the PAI score, in order to "establish[] a contextual background for the student's achievements," officials may consider an applicant's race in addition to the factors adopted in 1997. S.J.A. 29a; J.A. 482a-484a. Race is not considered in isolation, given independent weight, or used as a quota. S.J.A. 29a. Applicants whose AI/PAI scores place them above a cut-off point are admitted. J.A. 461a-463a, 470a.

2. Petitioner, a white applicant denied admission to the University in 2008, brought this action, alleging that the University discriminated against her on the basis of race in violation of the Fourteenth Amendment and 42 U.S.C. 1981, 1983, and 2000d *et seq.* Pet. App. 263a-264a.

The district court granted summary judgment to respondents. Pet. App. 261a-317a. The court of appeals affirmed. *Id.* at 147a-217a.

3. This Court granted certiorari, vacated the court of appeals' decision, and remanded for further proceedings. 133 S. Ct. at 2415. The Court did not disturb *Grutter*'s holding that a university may consider race in a manner that is narrowly tailored to achieving a compelling interest in the educational benefits of diversity. *Id.* at 2415, 2419-2420. The Court held, however, that the court of appeals had erroneously deferred to the University's conclusions in evaluating whether its admissions program was narrowly tailored. *Id.* at 2420-2421. The Court remanded to permit the court of appeals to assess the record "under a correct analysis." *Id.* at 2421.

4. On remand, the court of appeals held that the University had demonstrated that its consideration of race was necessary and narrowly tailored. Pet. App. 1a-54a. The court concluded that the University had established that considering race in its holistic admissions process to fill the remaining portion of the class was "necessary to target minorities with unique talents," *id.* at 48a, and to counter a "decreasing degree of minority classroom dispersion," *id.* at 50a. The court also held that the University's consideration of race was narrowly tailored because it treated applicants as individuals, *id.* at 47a-48a, and the University

had exhausted workable race-neutral alternatives, *id.* at 25a-29a.

Judge Garza dissented. Pet. App. 57a-90a. He would have held that the University's plan failed strict scrutiny because it was "impossible to determine whether the University's use of racial classifications * * * is narrowly tailored to its stated goal." *Id.* at 57a. In his view, the University had failed to define its goal of enrolling a "critical mass" of minority students in "any objective manner." *Ibid.*

SUMMARY OF ARGUMENT

I. This Court has held that attaining "the educational benefits that flow from student body diversity" is a compelling interest that may justify a university's consideration of race in its admissions process. *Fisher* v. *University of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (citation omitted); *Grutter* v. *Bollinger*, 539 U.S. 306, 328, 330 (2003). The educational benefits of diversity identified in *Grutter* and *Fisher* are of critical importance to the United States. The government has a vital interest in drawing its personnel—many of whom will eventually become its civilian and military leaders—from a well-qualified and diverse pool of university and service academy graduates. In particular, the Department of Defense (DoD) has concluded that a broadly diverse officer corps trained in a diverse environment is essential to military readiness. It is therefore imperative that officer training programs run by DoD and the Department of Homeland Security (DHS)—including service academies and Reserve Officers' Training Corps (ROTC) programs located at civilian institutions such as the University—produce racially diverse graduates who are prepared to lead a multiracial force.

II. In *Fisher*, this Court clarified that a reviewing court must closely scrutinize a race-conscious admissions plan to ensure that it is necessary and narrowly tailored to achieve the university's compelling interest in the educational benefits of diversity. 133 S. Ct. at 2419-2420. Petitioner contends that the requisite rigorous scrutiny is impossible unless a university identifies the number or percentage of minority students that its admissions plan is designed to reach. That argument is misconceived. *Grutter* and *Fisher* establish that the university's compelling interest is in creating an educational environment that affords the educational benefits of diversity. That objective, not any preordained demographic target, serves as the benchmark against which the university's means are measured.

A university must, however, explain its educational objectives with clarity in order to permit the reviewing court to meaningfully perform the tailoring analysis. *Fisher*, 133 S. Ct. at 2418. The university should describe the educational benefits of diversity it views as critical to its institutional mission. It should then explain in concrete, measurable terms what achievement of those objectives entails. For example, a university that seeks increased cross-racial interaction might define success as the point at which a certain percentage of seniors report that they have had opportunities to interact with students of other races in their classes and activities. Under *Fisher*, the university's explanation of its objectives is entitled to "some, but not complete, judicial deference," so long as the university has provided "a reasoned, principled explanation for the academic decision." *Id.* at 2419.

Once the university has defined its educational objectives, the court will be able to rigorously review whether the university's consideration of race is necessary and tailored to those goals. In performing that analysis, the court should require concrete evidence demonstrating that increasing diversity is necessary to permit the university to reach its educational goals, that race-neutral alternatives either do not achieve the benefits of diversity or do so only at the cost of sacrificing other critical educational objectives, and that the admissions plan promotes the university's goals while safeguarding individualized consideration. Conducted in this manner, the narrow-tailoring analysis will be both searching and consistent with the compelling interest recognized in *Grutter* and *Fisher*.

III. The University's admissions program is constitutional. The University defined its educational objectives with clarity, explaining that it sought to improve opportunities for cross-racial interaction, particularly in the classroom, in order to fulfill its mission of training the next generation of Texas leaders. The University also identified an interest in admitting minority students who had distinguished themselves academically in ways not captured by class rank or who had demonstrated non-academic achievements and leadership abilities.

The University's admissions program is narrowly tailored to achieve the University's compelling interest. The University demonstrated that it had not achieved the educational benefits of diversity in 2004 and 2008: classroom diversity had decreased despite the institution of the Top Ten plan; African-American enrollment had stagnated; and university officials reported that a majority of undergraduates believed

that there was no diversity in the classroom, and that minority students felt isolated in the classroom. The University's limited consideration of race in its holistic admissions analysis to fill out the last portion of the class is also designed to safeguard individualized consideration while enabling the University to construct a class that is diverse in all ways valued by the institution.

ARGUMENT

I. THE UNITED STATES HAS A CRITICAL INTEREST IN ENSURING THAT EDUCATIONAL INSTITUTIONS ARE ABLE TO PROVIDE THE EDUCATIONAL BENEFITS OF DIVERSITY

Over two hundred years ago, George Washington recognized the importance to the Nation of a university education that would "qualify our citizens for the exigencies of public, as well as private life * * * by assembling the youth from the different parts of this rising republic, contributing from their intercourse, and interchange of information, to the removal of prejudices which might perhaps, sometimes arise, from local circumstances." Letter from President George Washington to the Commissioners of the District of Columbia (Jan. 28, 1795), *in* 34 *The Writings of George Washington* 106-107 (John C. Fitzpatrick ed., 1940).

In *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), this Court reaffirmed the continuing vitality in our day of President Washington's common-sense insight, explaining that "the [N]ation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 324 (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 313 (1978) (opinion of

Powell, J.) (citation and internal quotation marks omitted). As the Court recognized, "[j]ust as growing up in a particular region * * * is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Id.* at 333.

In *Grutter*, the Court held that a university may conclude that the educational benefits of all types of diversity, including racial and ethnic diversity, are "essential to its educational mission." 539 U.S. at 328. Those benefits include "better prepar[ing] students for an increasingly diverse workforce and society," "promot[ing] 'cross-racial understanding,'" *id.* at 330 (citations omitted), and ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity," *id.* at 332. And in *Fisher* v. *University of Texas at Austin*, 133 S. Ct. 2411 (2013), the Court left undisturbed *Grutter*'s ultimate holding that obtaining "the educational benefits that flow from student body diversity" is a compelling interest that may support a university's narrowly tailored consideration of race in its admissions process. *Id.* at 2419 (quoting *Grutter*, 539 U.S. at 330).

The United States has a vital interest in ensuring that our Nation's universities maintain campus environments in which young adults from all segments of American society can develop—through exposure to people from a multitude of backgrounds, perspectives and experiences—a capacity to appreciate their fellow citizens as individuals, not as representatives of a particular group, and to forge relationships and pursue shared goals that transcend stereotypes and prejudice. Fostering the development of such a capacity is

essential to producing graduates who will be effective citizens and leaders in an increasingly diverse Nation, and effective competitors in diverse global markets, and ultimately it is essential to the preservation of our unique national strength that "comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all." *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment). And the United States has a particular interest in ensuring that it is able to draw its military and civilian personnel—many of whom will become our future leaders—from a pool of graduates who have developed this capacity.

A. The United States Armed Forces Have A Strong Interest In A Well-Qualified And Diverse Officer Corps, And The Educational Benefits Of Diversity Are Critical To Serving That Interest

The United States Armed Forces have concluded that it is critical to the Nation's military strength and readiness to maintain a pipeline of military officers who are highly qualified and racially diverse—and who have been trained to succeed in a diverse environment. The military service academies have at various times concluded, based on their assessment of their applicant pools and educational needs, that "limited race-conscious recruiting and admissions policies" are necessary to their mission of training future military leaders. *Grutter*, 539 U.S. at 331 (citation omitted); see Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. Times, Jan. 28, 2003, at A17. The United States therefore has a strong interest in ensuring that the service academies, as well as the universities that host ROTC

programs, retain the flexibility to consider race in the holistic manner contemplated by *Grutter* and *Fisher*.

1. The armed services have long recognized that building a cohesive military force that is both highly qualified and broadly diverse—including in its racial and ethnic composition—is a "strategic imperative, critical to mission readiness and accomplishment, and a leadership requirement." DoD, *Diversity and Inclusion Strategic Plan: 2012-2017*, at 3 (2012) (*Strategic Plan*). As both the enlisted ranks of the military and the Nation's population have become increasingly diverse, our military leaders have concluded that an officer corps that is markedly less diverse than the enlisted ranks, and that is unattuned to the perspectives and experiences of those they must lead, can undermine combat readiness. Maintaining a pipeline of well-prepared and diverse officer candidates is therefore an urgent military priority.

That military policy judgment reflects the hard lessons of battlefield experience. During the Vietnam War, for example, the disparity between the overwhelmingly white officer corps and the highly diverse enlisted ranks "threatened the integrity and performance" of the military. Military Leadership Diversity Comm'n, *Final Report, From Representation to Inclusion: Diversity Leadership for the 21st-Century Military* xvi (Mar. 15, 2011) (*MLDC Report*). Officers often failed to perceive racial tensions among enlisted personnel that threatened combat readiness. Bernard C. Nalty, *Strength for the Fight: A History of Black Americans in the Military* 303-317 (Free Press 1986). The absence of diversity in the officer corps also undermined the military's legitimacy by fueling "popular perceptions of racial/ethnic minorities serving as 'can-

non fodder' for white military leaders." *MLDC Report* 15.

In view of that history, our military leaders have concluded that an officer corps that shares the diversity of the enlisted ranks improves performance by "facilitat[ing] greater confidence" in leadership and assuring that all officers are trained to lead a diverse force. *MLDC Report* 44; U.S. Dep't of the Air Force, *Air Force Policy Directive 36-70* (Oct. 13, 2010). A military officer corps that is reflective of the general population that it has sworn to defend fosters civilian trust. Robert M. Gates, Lecture at Duke University (Sept. 29, 2010); *MLDC Report* 44. Maintaining a diverse leadership corps also ensures that the military contains the "cultural and racial identities" necessary "to better understand [its] partner forces." Gidget Fuentes, *SEALs Reach Out to Increase Diversity*, NavyTimes, Apr. 30, 2012; *MLDC Report* 17.

The military thus has a powerful interest in developing an officer corps that is prepared to lead a diverse force and that shares the diversity of the enlisted ranks and the general population. *Strategic Plan* 3-4; Admiral Michael G. Mullen, Chairman, Joint Chiefs of Staff, *The National Military Strategy of the United States of America* 16-17 (Feb. 8, 2011). Despite progress toward that objective, minorities remain "underrepresented among the Armed Forces' top leadership, compared with the servicemembers they lead." *MLDC Report* xiii.

2. Because the military does not hire its officer corps laterally, as a corporation might, *MLDC Report* xvi, the military's future leadership will necessarily be drawn from those who join the military today. That is why the services have concluded that fostering

student-body diversity is vital to the ability of the service academies and ROTC programs to provide a rigorous education for all students and prepare cadets for leadership roles.

For instance, the United States Air Force Academy has concluded that the highest quality military education comes from "exposing [cadets] to a broad range of ideas and experiences in both a formal classroom setting and in informal interactions with individuals whose background and experience offer dissimilar perspectives." Lieutenant Gen. Michael C. Gould, Superintendent, *The United States Air Force Academy (USAFA) Diversity and Inclusion Plan* 4 (2013). The USAFA's leadership training program is "best realized when the cadet cadre itself is widely diverse" so that cadets can "learn to bring out the best in each individual regardless of his or her background." *Id.* at 6; see U.S. Military Acad. (USMA): West Point, *USMA Strategic Plan 2015-2021*, at 25 (Mar. 2015) (when class composition "reflects the population of the Army and the Nation," cadets learn "sociocultural competencies essential to multicultural leadership in the 21st century"). To achieve their compelling interest in the educational benefits of diversity, service academies have at various times concluded, based on their educational needs, that it is necessary to consider race—along with other types of diversity—in evaluating individual applicants for admission. See p. 10, *supra*. If and when outreach and recruiting measures fall short, the academies need the flexibility to be able to consider race as one factor in a holistic review of each applicant in making admissions decisions.

ROTC programs, which provide military leadership training to undergraduates and are the single largest source of new officers, can best achieve their goals when their participating institutions are diverse. In particular, selective universities that admit the most talented students with leadership potential and provide opportunities for cross-racial interaction and other educational benefits of diversity are a critical source of future officers. DoD has found that minority officers who enter the military from "more selective colleges" have "significantly higher performance ratings" than similarly situated officers from less selective colleges. Office of the Under Sec'y of Def. for Pers. & Readiness, DoD, *Career Progression of Minority and Women Officers* 62 (1999). The military relies on the University and other schools with ROTC detachments to ensure that their student bodies are highly qualified, diverse, and trained to succeed in a diverse setting—by considering race in individualized admissions decisions, if necessary. See *Grutter*, 539 U.S. at 331.

B. Well-Qualified And Diverse Graduates Are Critical To Other National Interests

Numerous federal agencies have likewise concluded that well-qualified and diverse graduates are crucial to the fulfillment of their missions.

A pipeline of highly qualified, diverse graduates is critical, for example, to the Nation's law-enforcement and national-security needs. As Federal Bureau of Investigation Director James Comey has stated, "[i]t is imperative for all of us in law enforcement to try to reflect the communities we serve." Josh Gerstein, *Amid Race Talk, FBI Struggles to Hire Black Agents*, Politico, Feb. 13, 2015. Similarly, DHS requires a

"workforce with diverse backgrounds, experiences, and competencies" in order to "optimize[] DHS's effectiveness in serving a heterogeneous public and coordinating with international partners to secure the homeland." Office for Civil Rights & Civil Liberties, DHS, *MD-715 EEO Program Status Report: FY 2009*, at 7; accord DHS, *Diversity and Inclusion Strategic Plan: Fiscal Years 2012-2015*, at 2.

The Department of Health and Human Services has made it a priority to foster diversity among undergraduates who major in health-care-related fields. Developing a national workforce of practitioners and researchers who are prepared to address minority health issues, and who also have diverse backgrounds, will help address concerns that minorities remain less likely to have access to quality health care. See, *e.g.*, 42 U.S.C. 293(a).

Other agencies also have concluded that well-qualified, diverse graduates are essential to their missions. The Department of Education, whose mission includes fostering educational excellence and promoting diversity in post-secondary institutions, encourages grant applicants to develop projects that are designed to "increase racial, ethnic, and socioeconomic diversity." 79 Fed. Reg. 73,444 (Dec. 10, 2014); see *id.* at 73,452. The Department of Commerce has an interest in promoting equal educational and economic opportunities and diversity among the leaders of commercial enterprises. The Department of Labor has an interest in ensuring that workforce leaders are well prepared to lead a diverse workforce.

II. THE NARROW-TAILORING INQUIRY UNDER *GRUTTER* AND *FISHER* EXAMINES WHETHER A UNIVERSITY'S CONSIDERATION OF RACE IS TAILORED TO ITS CONCRETELY DEFINED EDUCATIONAL OBJECTIVES

In *Fisher*, this Court did not disturb *Grutter*'s holding that obtaining "the educational benefits that flow from student body diversity" is a compelling interest that may support a university's consideration of race in its admissions process. 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 330). The Court likewise left in place *Grutter*'s holding that a court should accord "some, but not complete, judicial deference" to a university's "academic judgment" that the educational benefits of diversity are essential to its mission. *Ibid.*; see *Grutter*, 539 U.S. at 328.

The *Fisher* Court then clarified the narrow tailoring aspect of strict scrutiny. The Court explained that a university "must prove that the means chosen * * * to attain diversity are narrowly tailored" to its objectives, and that it "receives no deference" with respect to that ultimate question. 133 S. Ct. at 2420. To establish that its program is narrowly tailored, a university must demonstrate that its admissions process evaluates each applicant "as an individual and not in a way that makes" race "the defining feature" of the application. *Ibid.* (citation omitted). The university must also establish that considering race is "'necessary' * * * to achieve the educational benefits of diversity." *Ibid.* (citation omitted). That analysis, the Court stated, "involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." *Ibid.* At the same time, "a court can take account of a university's

experience and expertise in adopting or rejecting certain admissions processes." *Ibid.*

Petitioner contends (Br. 25-28) that the University has failed to define its educational objectives with enough precision to permit a court to determine whether the University's consideration of race is narrowly tailored. In petitioner's view (Br. 27, 28, 45-46), a university must identify, in advance and in the abstract, the level of minority representation—a "specific" demographic "goal"—that would be sufficient to attain the educational benefits of diversity. That argument rests on a misreading of *Grutter* and *Fisher*. Those decisions establish that attainment of the educational benefits of diversity, not any fixed demographic target, should serve as the benchmark against which the university's means are measured.

That does not preclude a rigorous narrow-tailoring inquiry. To the contrary, a university must clearly explain its objectives, *Fisher*, 133 S. Ct. at 2418, including by setting forth the concrete circumstances that will constitute achievement of the educational benefits of diversity. The court will then be able rigorously to review whether the university's consideration of race is necessary and tailored to its objectives. In performing that analysis, the court should require the university to produce concrete evidence demonstrating that current demographic levels are insufficient to permit the university to reach its educational goals and that workable race-neutral alternatives will not suffice. Conducted in this manner, the narrow-tailoring analysis will be both searching and consistent with the compelling interest recognized in *Grutter* and *Fisher*.

A. A University Must Concretely Define Its Educational Objectives Without Identifying A Demographic Goal

1. Grutter *and* Fisher *defined sufficient diversity as the point at which a university attains the educational benefits of diversity*

In *Grutter*, the Court upheld the University of Michigan Law School's admissions plan, which was designed to obtain a "critical mass" of minority students. 539 U.S. at 329 (citation omitted). The Law School used the phrase "critical mass" as shorthand to describe a student body that would produce the educational benefits of diversity. *Id.* at 329-330. In upholding the program, the Court emphasized that the Law School did not define "critical mass" as "some specified percentage of a particular [racial] group"; rather, the "concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Ibid.* The Court in *Fisher* similarly observed that a university may consider race in admissions in order to assemble a sufficiently "diverse student body," 133 S. Ct. at 2419, "to obtain the educational benefits of diversity," *id.* at 2421.

Grutter and *Fisher* thus make clear that attaining the educational benefits of diversity is the compelling interest that may justify considering race in admissions, and racial and ethnic diversity within the student body is a means to that end. Sufficient diversity cannot be defined in advance with mathematical precision, but is instead attainment of the qualitative and quantitative diversity that allows the university to achieve its educational objectives—objectives that will necessarily vary depending upon the university's particular circumstances. See *Grutter*, 539 U.S. at 318, 330; contra Pet. Br. 27-28, 30, 43.

Accordingly, *Grutter* and *Fisher* held that a university *may not* implement a target level of diversity divorced from the university's educational objectives, and petitioner is therefore incorrect in contending that the "clarity" required by *Fisher* requires a university to identify a "'demographic' goal." Pet. Br. 27-28 (citing *Fisher*, 133 S. Ct. at 2418); Pet. App. 67a (Garza, J., dissenting). There is no reason to assume that "the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide" with predetermined target levels of diversity. See *Parents Involved*, 551 U.S. at 727 (opinion of Roberts, C.J.); accord *id.* at 797-798 (Kennedy, J., concurring in part and concurring in the judgment). To the contrary, identifying a demographic target as petitioner maintains is required would raise concerns that the target would function as an unconstitutional quota. See *Fisher*, 133 S. Ct. at 2419; *Grutter*, 539 U.S. at 389 (Kennedy, J., dissenting). Instead, a university can explain its objectives with the requisite clarity by describing the specific benefits of diversity it seeks and identifying in concrete, measurable terms what it views as attainment of the educational benefits of diversity.

2. A university should define its educational objectives in concrete, measurable terms

Under *Grutter* and *Fisher*, then, a university must define its objectives in terms of the educational experience it seeks to provide, not the means—increasing diversity levels—to that end.

First, the university should describe what educational benefits of diversity it views as critical to its institutional mission and how it weighs diversity in relation to its other institutional goals. The university

should explain why certain benefits of diversity (*e.g.*, cross-racial interaction, decreased racial isolation) are important to its institutional mission, as well as the types of diversity it seeks.

Second, the university should explain with clarity what attainment of the educational benefits of diversity entails—in other words, how the university will measure success. For instance, a university that seeks to provide opportunities for cross-racial interaction in all aspects of campus life might define success as the point at which a certain percentage of graduating seniors report that, in their years on campus, they have had meaningful interactions with students of other races in classes and activities, and faculty members confirm those accounts. A university focusing on providing visible pathways to leadership, *Grutter*, 539 U.S. at 332, might define success as increasing minority retention and graduation rates and minority participation in academic and extracurricular leadership activities. A university whose educational objective involves ameliorating pre-existing racial tension and isolation on campus might explain that it will consider its goal met when several years have passed with no racial incidents on campus and a majority of minority students report that they do not feel like spokespersons for their race. See *id.* at 319-320.

In reviewing the university's explanation of its objectives, the court should accord the university "some, but not complete, judicial deference." *Fisher*, 133 S. Ct. at 2419. That is because a university's conclusion that the benefits of diversity are "integral to its mission" reflects its "academic judgment." *Ibid.* A university's definition of the attainment of those benefits is similarly an exercise of educational judgment and

expertise, to which some deference is appropriate. Judicial review of the university's explanation of its objectives therefore focuses on whether the university has provided "a reasoned, principled explanation for the academic decision." *Ibid.* In addition, the reviewing court should be satisfied that the university has defined its compelling interest in the educational benefits of diversity with "clarity," so that the court is able to understand the educational environment the university seeks. *Id.* at 2418.

B. *Grutter* And *Fisher* Establish That Strict Scrutiny Examines Whether The University's Consideration Of Race Is Narrowly Tailored To Its Qualitative Educational Goals

While a reviewing court may accord deference to "a university's definition of its educational objective," it may not defer to the university's "implementation of this goal." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); accord *Fisher*, 133 S. Ct. at 2420. The narrow-tailoring analysis therefore entails a rigorous examination of the university's admissions program. To establish that its admissions program is narrowly tailored, a university must demonstrate based on concrete evidence that (1) it needs to increase diversity to attain its educational objectives; (2) race-neutral alternatives will not suffice; (3) its program assesses each candidate as an individual with a goal of broad diversity, not just racial diversity; and (4) the program is limited in time. Those requirements, taken together, provide the "essential safeguard" that this Court's decisions require. *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

1. The university's showing of necessity focuses on the current quality of the university's educational

environment. The university must demonstrate that despite employing workable race-neutral alternatives, it is currently unable to provide the educational benefits of diversity without considering race. *Fisher*, 133 S. Ct. at 2420.

The university must provide concrete evidence documenting the ways in which its educational environment has not yet reached the point the university defines as success. The university may choose the metrics by which to evaluate its educational environment based on relevance to its objectives and its understanding of the campus environment. For instance, a university seeking cross-racial interaction might examine data that indicate that a substantial percentage of students graduate without taking classes that include minority students. A university may also look to minority students' accounts that they are isolated in the classroom, or faculty accounts of the quality of student discussions.

The university must also satisfy the court that improving diversity levels is necessary to enable the university to reach its educational objectives. Demographic data will thus necessarily be part of the analysis—but it is relevant for its effect on the university's ability to provide the educational benefits of diversity, not (as petitioner contends, Br. 27-28) for its own sake. For instance, a university might conclude that, as in *Grutter*, particularly low minority representation in the student body supports an inference that the minority population is simply too small to ensure that minority students do not feel like spokespersons for their race. 539 U.S. at 319-320.

The reviewing court should carefully scrutinize the university's explanation of why, despite the current

diversity levels, the university has not yet attained the educational benefits it seeks. Because the analysis focuses on the impact of diversity on the educational experience, a court should not assume that a university has achieved the educational benefits of diversity simply because its diversity levels appear substantial in the abstract. But as a minority group's representation increases substantially, the university will have more difficulty demonstrating that the educational benefits of diversity derived from that group's presence on campus are still lacking, or that race-neutral methods have been unsuccessful.

2. The university must also demonstrate that "no workable race-neutral alternatives would produce the educational benefits of diversity." *Fisher*, 133 S. Ct. at 2420. The university must show that the race-neutral measures it has employed have not enabled it to achieve its educational goals, and that alternatives it did not employ were not workable, because, for example, they would have achieved diversity only by compromising other important educational objectives. *Ibid.* In considering workability and the impact of alternative proposals on the full range of educational objectives, the court should "take account of a university's experience and expertise." *Ibid.*

3. The qualitative nature of the university's compelling interest also determines the substance of the university's demonstration of a close "fit" between its objectives and its consideration of race. Because the objective approved in *Grutter* is an educational environment achieved when students are diverse in all respects, not simply race and ethnicity, an admissions program must "ensure that each applicant is evaluated as an individual and not in a way that makes an

applicant's race or ethnicity the defining feature of his or her application." *Fisher*, 133 S. Ct. at 2418 (quoting *Grutter*, 539 U.S. at 334, 337). Such a program also avoids imposing an undue burden on unsuccessful applicants.

Grutter and *Fisher* thus refute the argument of Judge Garza, dissenting below (Pet. App. 80a), that a university must establish that "race was in fact decisive" for particular applicants in order to demonstrate that its consideration of race furthers its goals. Because this Court requires a university to consider the totality of an applicant's characteristics without making race the predominant consideration, *Grutter*, 539 U.S. at 334, 337, it would be impossible to say for any particular applicant that race was determinative—just as it would be impossible to say that musical talent was alone determinative. It would also be impossible for a university to establish that its consideration of race has resulted in the admission of particular numbers of minorities—indeed, a university's ability to make that causal connection would be a strong sign that it had improperly given race predominant importance. See *Gratz* v. *Bollinger*, 539 U.S. 244, 272 (2003).

Grutter and *Fisher* therefore accept that an admissions plan that considers race as one factor among many valued characteristics will generally promote the university's efforts to increase diversity—even though the individualized nature of the plan prevents its effects from being precisely quantifiable. *Grutter*, 539 U.S. at 337; see *Fisher*, 133 S. Ct. at 2420. The university may therefore establish the requisite fit by showing that its admissions program is designed to admit students who are diverse in the ways the uni-

versity values and that it preserves individualized consideration. See *ibid.*

4. Finally, a university must demonstrate that its admissions policy is "limited in time." *Fisher*, 133 S. Ct. at 2421; *Grutter*, 539 U.S. at 342. *Fisher* left in place *Grutter*'s holding that "the durational requirement can be met by sunset provisions * * * and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Grutter*, 539 U.S. at 342; see *Fisher*, 133 S. Ct. at 2421.

Permitting the university to use a periodic evaluation to satisfy *Grutter*'s durational requirement does not, as Judge Garza asserted, "delegate wholesale to state actors the task of determining" whether considering race remains necessary. Pet. App. 82a. The reviewing court should disapprove periodic-evaluation plans that lack clarity concerning the university's objectives and how it will assess their attainment. See pp. 19-21, *supra*. And in all events, a university's periodic reviews do not insulate it from the possibility of subsequent suits, if the university continues to consider race after it has become unnecessary.

C. The Strict Scrutiny Analysis Contemplated By *Grutter* And *Fisher* Involves A Rigorous Examination Of A University's Conclusion That It Needs To Consider Race

The narrow-tailoring analysis requires a university to explain its educational goals clearly and concretely, and to demonstrate that considering race is necessary to permit the university to fulfill its compelling educational interest.

Fisher expressly contemplates that in reviewing a university's showing, the court may accord "some, but

not complete, judicial deference" to a university's "experience and expertise" with respect to certain questions involving educational judgments: a university's decision to pursue particular educational benefits of diversity, and its judgment that particular race-neutral alternatives would unacceptably compromise other educational objectives. 133 S. Ct. at 2419-2420. That logic applies equally to aspects of the narrow tailoring analysis that similarly involve educational judgments, such as a university's decision about how to define attainment of the educational benefits of diversity, see pp. 19-21, *supra*, and its decision that particular tools are best suited to measure its current educational environment. The reviewing court therefore need not second-guess educational judgments that undergird the university's decision to focus on certain aspects of its educational environment.

The court should, however, closely scrutinize the university's ultimate conclusion that it needs to consider race. The court should require concrete evidence that existing levels of diversity are insufficient to achieve the educational benefits of diversity and that workable race-neutral methods will not suffice. Ultimately, the reviewing court must be satisfied, after a searching analysis of the whole record, that the university's conclusions are well supported by concrete evidence.

III. THE UNIVERSITY OF TEXAS HAS ESTABLISHED THAT ITS CONSIDERATION OF RACE IS NARROWLY TAILORED

The University's admissions program is constitutional because the University has demonstrated that its consideration of race is narrowly tailored and nec-

essary to achieve its educational objectives as Texas's flagship university.

A. The University Clearly Defined The Educational Benefits It Seeks

1. The University concluded that its educational mission is to provide a "comprehensive college education," S.J.A. 23a, and "to produce graduates who are capable of fulfilling the future leadership needs of Texas," S.J.A. 24a. Particularly given that Texas will soon "have no majority race," its leaders "must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate." *Ibid.* The University therefore sought a diverse student body in order to provide ample opportunities for cross-racial interaction in all aspects of campus life, and in particular, in the classroom. *Grutter*, 539 U.S. at 331-332.

Those determinations about which benefits of diversity are particularly important to the University are precisely the sort of "complex educational judgments" that fall within the core of the University's expertise. *Grutter*, 539 U.S. at 328. As this Court held in *Fisher*, therefore, the lower courts "were correct" in according deference to the "University's conclusion * * * that a diverse student body would serve its educational goals." 133 S. Ct. at 2419.

2. In evaluating its ability to provide the educational benefits of diversity, the University emphasized that two related benefits—increasing cross-racial interaction in the classroom and training students to succeed in a diverse environment—were particularly central to its educational mission. S.J.A. 23a-25a. The University accordingly examined two metrics—classroom diversity and demographic disparities—

that it concluded were relevant to its ability to provide those benefits of diversity. *Ibid.* Contrary to petitioner's argument (Br. 43-45), the University adequately defined the improvements it sought in both metrics and established that its goals are consistent with *Grutter* and *Fisher*.

a. The University explained that it viewed the opportunity for cross-racial interaction in the classroom as particularly important to producing future leaders prepared to succeed in diverse professional environments. S.J.A. 24a. That conclusion reflects the University's educational judgment about the most beneficial means of student interaction—a judgment that *Grutter* expressly approved. 539 U.S. at 330.

The University used its classroom diversity study as one means of measuring cross-racial interaction in the small classes that are most likely to foster discussion and student interactions. S.J.A. 24a-25a, 69a; J.A. 316a-317a. The University explained that "success[]" on the classroom-diversity front meant avoiding having "large numbers of classes in which there are no students—or only a single student—of a given underrepresented race or ethnicity." S.J.A. 25a. In other words, the University sought to ensure that all students, as they take various classes during their years at the University, will have the opportunity for classroom interaction with students of other races. The University accordingly stated that it would measure success by evaluating the experiences students reported in the classroom, rather than by looking for a predetermined numerical diversity level. See J.A. 317a-318a.

Petitioner is therefore wrong in asserting (Br. 45) that the University sought to ensure that every small

class has some minimum number of minority students. The district court found that the University had no such goal in mind, Pet. App. 303a, and petitioner points to no evidence to the contrary.

b. The University looked to the demographics of the statewide population to assess whether it was fulfilling its interests in "prepar[ing] students for an increasingly diverse workforce and society," *Grutter*, 539 U.S. at 330 (citation omitted), and being "visibly open to talented and qualified individuals of every race and ethnicity," *id.* at 332; S.J.A. 1a. To be sure, a university seeking to justify considering race in admissions may not use statewide demographics as a benchmark to set a numerical goal for admissions. *Fisher*, 133 S. Ct. at 2419. But *Grutter*'s recognition that "prepar[ing] students for an increasingly diverse workforce and society" is a benefit of diversity, 539 U.S. at 330 (citation omitted), indicates that a university need not blind itself to the characteristics of the community into which students will graduate. Here, the University concluded that the stark disparity between the makeup of the campus and the makeup of the State as a whole supported its conclusion that its campus environment was "less-than-realistic" and therefore not "conducive to training" future leaders. S.J.A. 24a-25a.

While the University viewed the demographic disparity as cause for concern, it did not attempt to balance its student-body demographics with the outside population. The University emphasized that it would measure success by evaluating the quality of the educational experiences it was providing rather than by comparing its minority population to the State's. S.J.A. 24a-25a.

3. The University's discussion of its holistic analysis reveals that it had an additional interest, related to its classroom-interaction interest, in admitting students of all races who "can enrich classroom discussions with their unique experiences." S.J.A. 28a.

Because the University's admissions process proceeds on two tracks—the Top Ten plan and the holistic analysis—it must use the holistic analysis to admit students whose academic excellence is not captured by class rank or whose primary contribution to the University will be their non-academic experiences and personal achievements. See S.J.A. 27a-28a. Students admitted through the Top Ten plan—minority and non-minority alike—are admitted solely for their academic achievements measured by class rank. By contrast, students admitted through the holistic analysis are often selected primarily for their *non-academic* attributes: extraordinary extracurricular achievements or triumph over significant hardships. J.A. 430a. While those applicants may also have academic abilities not reflected in their class rank, their distinguishing feature is that they possess experiential qualities that Top Ten admittees who have focused on academics may not. S.J.A. 28a. The University therefore had an interest in ensuring that it admitted minorities whose primary achievements extended beyond academics or whose accomplishments were not fully captured by class rank.[1] See J.A. 482a-484a.

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[1] Contrary to petitioner's argument (Br. 29), the University has not asserted an interest in admitting minorities educated in "predominantly white high schools." The University has explained that it seeks to admit minority students with a variety of backgrounds, Resp. Br. 29-31, J.A. 253a, 258a-259a, 260a-261a, 318a, 359a-361a; that the holistic analysis focuses on those whose primary contribu-

That interest is consistent with *Grutter*, which explained that a university should consider all aspects of diversity and seek to admit students who are diverse in all respects. 539 U.S. at 338.

B. The University Has Established That It Had Not Attained Sufficient Diversity To Fully Provide The Educational Benefits Of Diversity In 2004 And 2008

The University's conclusion that it had not achieved the educational benefits of diversity in 2004 and 2008 is well supported by concrete evidence. By 2004, when the University decided to include race in its holistic analysis, it had employed race-neutral measures—the Top Ten plan, an extensive scholarship program, recruitment efforts, and consideration of socioeconomic factors—for several years. S.J.A. 30a-32a. The University concluded that increasing its reliance on race-neutral measures was not workable: admitting all students exclusively based on class rank would have led to a "dramatic sacrifice of diversity" of all kinds, *Grutter*, 539 U.S. at 340; the University did not have the budget to increase scholarships, S.J.A. 31a-32a; and the percentage of holistic admittees who were minorities had remained stagnant despite consideration of socioeconomic factors, S.J.A. 45a; J.A. 176a. Petitioner does not seriously dispute those conclusions. Br. 47. Rather, her primary contention (Br. 45-46) is that by 2004, the University had achieved sufficient diversity to attain its educational goals, such that considering race was not necessary. Petitioner is incorrect.

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tions to the student body may be experiential or not reflected in class rank, S.J.A. 28a; and that considering race would provide useful additional context in that analysis, S.J.A. 29a.

The classroom diversity study demonstrated that as the University increased the number of smaller classes between 1996 and 2002, the percentage of classes with one or no African-American or Hispanic students had increased (to 90% and 43%, respectively). S.J.A. 26a. That trend raised concerns, S.J.A. 25a, because the University intended to increase the number of smaller classes, S.J.A. 70a. An unintended consequence of that effort could be a likelihood that students would graduate from the University without experiencing to any significant degree the cross-racial interaction in the classroom that the University believed to be an important part of a full educational experience.

Turning to student-body demographics, African-American enrollment had increased only slightly since the Top Ten plan's institution in 1998. In 2004, African Americans totaled only 309 enrolled freshmen out of 6796 (5%), and in 2008, they accounted for 375 out of 6715 (6%). S.J.A. 156a. Petitioner does not contend that those numbers were sufficient to avoid racial isolation, promote cross-racial understanding, and materially increase classroom cross-racial interactions—much less provide a visible path to leadership. See *Grutter*, 539 U.S. at 332.

Hispanic students, for their part, made up 16.9% of the freshman class in 2004, and 20% in 2008. S.J.A. 156a. Those numbers may have alleviated concerns about racial isolation and tokenism campus-wide. But other evidence indicated that Hispanic students were not yet present in sufficient numbers to alter student experiences. The trend toward less classroom diversity held true of Hispanic as well as African-American students. S.J.A. 72a-73a. In addition, "a majority of

undergraduates" reported that they believed "there was no diversity in the classroom," and "minority students" reported that they "still felt isolated in the classroom." J.A. 446a; see J.A. 317a-318a. That evidence was particularly troubling in light of the University's mission of training students to succeed in a State in which Hispanics represented a fast-growing segment of the population. S.J.A. 24a. The University therefore had ample reason to conclude that it could not provide the degree of cross-racial interaction necessary to prepare its students for leadership in Texas. See *ibid.*

The University's determination that it needed to consider race was buttressed by its desire to select a class "consisting not only of academically qualified individuals with a high probability of success, but also individuals who can enrich classroom discussions with their unique experiences." S.J.A. 28a; see *id.* at 29a. By 2003, the non-Top Ten admissions process became extremely selective. J.A. 408a; see J.A. 462a-463a. Excluding all consideration of race, the University had increasing difficulty ensuring that its non-Top Ten admissions included significant numbers of minority students who possessed the attributes valued by the University but not necessarily accounted for in Top Ten admissions.[2] See pp. 30-31, *supra*. Taking race

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[2] Petitioner criticizes (Br. 36) the University for failing to determine whether minority students admitted through the Top Ten plan possessed the qualities it looks for in the holistic analysis. But a stated purpose of the holistic analysis is to admit students whose personal and academic achievements are not reflected in their class rank. S.J.A. 28a. While some Top Ten admittees likely share the interests and perspectives of those admitted through the holistic analysis, it would be surprising—and fortuitous—if the

into account as one factor in the holistic individual assessment therefore helped ensure that "minority student[s]" whose personal and academic achievements are not reflected in their class rank would be considered "sufficiently meritorious and diverse" to be admitted. J.A. 484a.

C. The University's Consideration Of Race Directly Advances Its Goals

The University's admissions plan is also "specifically and narrowly framed" to accomplish the University's goals. *Fisher*, 133 S. Ct. at 2420. As required by *Grutter* and *Fisher*, the plan gives individualized consideration to each applicant, does not make race the "defining feature" of any application, and is limited in time. *Ibid.*; S.J.A. 29a; see pp. 23-25, *supra*. Petitioner rightly does not contend otherwise.

The University's consideration of race is also designed to achieve its objectives. As the University explained, its consideration of race bolstered minority enrollment in the overall student body by "increas[ing] the chance that an underrepresented minority student will be sufficiently meritorious and diverse" to be admitted. J.A. 484a. The University's consideration of race also promoted its interest in cross-racial interaction in the classroom, helping to ensure that all graduates have a real opportunity for such interaction during their time on campus. The University concluded that minority individuals admitted for their leadership potential and non-academic achievements would "enrich classroom discussions with their unique experiences." S.J.A. 28a. Increas-

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portion of the class admitted based solely on class rank were broadly diverse in all the ways the University values.

ing minority representation in the student body also would necessarily increase classroom representation overall.[3] S.J.A. 25a. In addition, those admitted for their diverse characteristics might be drawn to classes and activities not heavily populated by minorities admitted through the Top Ten plan. In 2007, for instance, holistic admittees accounted for a significant portion of the freshman minorities enrolled in the Schools of Fine Arts, Education, and Social Work. S.J.A. 166a.

Petitioner's arguments to the contrary are without merit. Petitioner's primary contention (Br. 46-47) is that the University's consideration of race did not result in the admission of a sufficient number of minorities to be effective. See Pet. App. 71a (Garza, J., dissenting). But the fact that the University's consideration of race produced measured rather than drastic increases is a virtue not a vice, as it results from the individualized, holistic nature of the University's consideration of race. See *Grutter*, 539 U.S. at 390-391 (Kennedy, J., dissenting) (plans that have a limited effect on minority admissions are more likely to safeguard individualized consideration). Indeed, a holistic admissions plan that is permissible under *Fisher* and *Grutter* will necessarily produce incremental rather than drastic gains in minority admissions. See *ibid.*; pp. 24-25, *supra*. Having not yet reached its educational goals despite employing race-neutral measures to the extent workable, the University was entitled to

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[3] Because the University sought only to avoid "large numbers" of homogenous classes, S.J.A. 25a, not to ensure minority representation in each class, petitioner is incorrect in contending (Br. 45) that the University would have needed to "flood[] the system" with minority students in order to improve classroom diversity.

conclude that incremental gains would help promote its objectives.

Finally, petitioner is wrong to suggest (Br. 46) that *Parents Involved* establishes that the University's policy is unconstitutional on the ground that its costs outweigh its benefits. In *Parents Involved*, school districts used race in a predominant, mechanical fashion to dictate school assignments, and they failed to consider whether, in light of the policies' minimal impact, other less restrictive measures would have been as effective. 551 U.S. at 711, 733-734. One such means would have been a "more nuanced, individual evaluation of school needs and student characteristics that might include race as a component" and that would be "informed by *Grutter*." *Id.* at 790 (Kennedy, J., concurring in part and concurring in the judgment). That individualized evaluation is precisely what the University has instituted. *Parents Involved* does not suggest that in order to be narrowly tailored, such a holistic, individualized policy must have drastic effects.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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